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Discussion

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## DISCUSSION FOLLOWING THE REMARKS OF MR. MCRAE AND MR. COLSON

MR. McILROY: We are ready for questions. And the first one I see is Dr. King's hand up.

PROFESSOR KING: Yeah, I had a question. I'm a poor, self-respecting salmon, and I want to spawn, that's a natural desire. What I'm concerned about is the enforcement of these rights of the salmon in the spawning grounds, and the enforcement of this whole thing. I mean, how do we do it? How do we -- Don, you talked about a lot of complex agreements. And Jim wisely said that one concern here was the fisher, the fish. You want to preserve the fish; to survive, the fish have to spawn.

What about the enforcement of the fish's rights to spawn? How does that happen? I mean is there something I don't know about? Or, if maybe you could enlighten us on it. It's a question of survival.

MR. McRAE: In very formal legal terms, the fishery is controlled in Canada by the Department of Fisheries and Oceans. And its first objective is to put fish on the spawning ground, what is referred to as escapement. Its second objective is to provide a food fishery for First Nations. And then its other objectives relate to commercial and recreational fishery.

So it manages the fishery by opening for the commercial fishery when it is assured that enough fish have passed through to get up to the spawning ground.

Now, that raises some really difficult questions. How do tell if enough fish have escaped to the spawning grounds? They have counting mechanisms in the rivers to determine how many fish have reached a certain point. They have assessments on the ground to make sure that enough salmon actually got to the spawning ground.

But when you get to endangered species and the Species at Risk Act, there are more difficult questions. Currently, in British Columbia, there has been a request for an emergency listing under the Species at Risk Act of two stocks of salmon, one going to Cultus Lake and one going to Saginaw Lake. But, should every separate stock and every single stream in British Columbia be protected. Or, do we say we're protecting enough salmon overall in the Fraser River that we don't have to protect the particular stock in Cultus Lake. Some fishers might say you are making a choice between our economic livelihood and protecting the Cultus Lake salmon. But what about the cottages around Cultus Lake pollution from which might have inhibited the salmon from spawning? They are paying nothing for the decline in the stocks; it is the commercial fishery that is paying.

Thus, getting salmon to the spawning ground is a complicated question of reconciling and balancing interests. Overall, there is a reasonably effective method to make sure salmon are able to spawn. But of course, the most effective method is you just don't let people fish.

MR. McILROY: We have another question up there in the corner.

MR. KERESTER: Has the delegation of authority by Congress to the Regional Council ever been challenged as an improper delegation of legislative authority? And, two, in the case of the 200-mile limit, is there some international agreement recognizing the 200-mile limit, or does it depend on the strength of your Navy?

MR. COLSON: On the latter question, I think that international state practice has evolved to the point that all countries in the world have 200-mile limits that are capable of having 200-mile limits; this is a centerpiece of the 1982 Law of the Sea Convention that virtually all countries are party to, including Canada. The United States is still considering that. But I think that there's no question about the legality of the 200-mile limit.

The first question --

PROFESSOR KING: You didn't discuss the Customary International Law. It's Customary International Law.

MR. COLSON: All right. I agree, but the arbitrator who says it's customary international law remains to be determined.

But on the first question, no, and I don't think anybody has ever challenged the law on that basis -- it is putting in the hands of a regional grouping the power to make a particular kind of decision. I don't think anybody's ever even assumed that there was a Constitutional problem with that delegation.

PROFESSOR KING: Could I ask another question?

MR. McILROY: Dr. King has -- this gentleman here has a mike in his hand, so we'll let him go first, and then Dr. King next, please.

MR. JENSEN: Erik Jensen, Case School of Law. I am intrigued by the idea that the Canadian government is still in the process of entering into treaties with First Nations, I mean, something that hasn't happened in the United States since 1871.

Can the panelists please discuss the reason for the different legal statuses of First Nations in the two countries?

MR. McRAE: I'm not sure that I can answer that question, because I'm really not an authority on aboriginal or constitutional law.

Nigel Bankes, do you know why they didn't conclude treaties in British Columbia?

MR. BANKES: Well, I think we stopped negotiating treaties in about 1924, was our last formal treaty negotiation. And then we started a new round with the northern First Nations in the mid 1970s with Quebec, knowing -- Quebec being first, and then throughout the territories and through into British Columbia.

But, of course, there is an analogy with the United States, because the last treaty in the United States was probably the Native Claims Settlement in Alaska in the early 1970s, which was, if you'd like, almost a prelude to the new round of treaty negotiations in Canada, I mean, that whole land claim settlement negotiations, but they're treaty negotiations.

MR. JENSEN: They're not treaties for purposes of United States law, I don't think, in the United States.

MR. COLSON: Well, our treaties, the U.S. treaties with the tribes that were entered into as treaties, are treaties of the United States. And there is a body of law that surrounds that. If you go to the old executive office building, there is the treaty room. And it is because it was the room that all of the chiefs would come to Washington in the 19th Century and sign treaties with the President. It's a beautiful room.

MR. JENSEN: But that doesn't happen anymore.

MR. COLSON: No, because now it is a question of what do those treaties mean. And that is a source of constant litigation in the Federal Courts, and debate and negotiation with Federal bureaucracies and tribal bureaucracies, but I don't think -- I've never heard of a situation where someone was promoting that the way to resolve a new problem was to renegotiate or negotiate a new treaty between the Federal Government and one of the native tribes.

MR. McILROY: Dr. King, and then Michael Robinson.

PROFESSOR KING: Yeah. I had a question, two aspects: first, does the reluctance of the Senate to ratify treaties in the fisheries area, is that a handicap? And, secondly, what effect does the Law of the Sea Convention, if, by any chance, we ever ratify it, affect -- what effect does that have on this whole fisheries question? I'd address it to Dave Colson.

MR. COLSON: Well, first, on the -- your latter question, I don't think it has any effect, really. I mean, it's sort of a non-issue, in my mind.

On the former question, somebody asked the question yesterday about what would the two Senators from North Dakota think about doing some kind of a deal affecting their state's interest. I think there's a tradition in the United States that when a treaty affects a particular region, that the Senators from that region better be onboard if the Senate is to act positively.

And let's say the two North Dakota Senators are adamantly opposed, but the President and the Secretary of State are up before the Senate talking about the U.S. national interests or something, and we ought to do this, deal with Canada about North Dakota. It just doesn't happen that way. That's not the way the United States Senate has traditionally worked, and it's not likely to work.

So when we have a fisheries issue, if we get solid regional political support, like in the Pacific Salmon negotiations, in the Pacific Salmon Treaty, at that time we had the political support of the Senators from the concerned

states. And when that happens, such treaties get through like, you know, without any difficulty.

I will note that at the end of 1970s, when the United States and Canada were trying to come to grips with all of the fish problems that were created by the 200-mile zone, we submitted to the Senate the big East Coast Fish Treaty with Canada. That was justified to the Senate in terms of broad national interests. It was something that both the Secretary of State and the President were very much supportive of. And there wasn't one New England Senator that would support the Treaty. It was dead in the water.

And no matter -- so, I mean, that's just the way American politics work in the Senate. So if you've got the support, you'll get it done on these agreements that are regionally focused.

MR. McILROY: Michael Robinson, you had a question, I believe.

MR. ROBINSON: Thanks, Jim. It was more of a follow-up on the question about why we're only negotiating treaties in B.C. with the native bands now. I am certainly no expert on native treaty law, but I had always understood that the popular understanding is it wasn't necessary; nobody wanted to go into northern B.C. and "occupy" it.

At that time, the population of B.C. was confined to sort of Vancouver and Victoria. And they had very strange governments out there. Some of you will be interested to know that the first Governor of British Columbia was named Amor DeCosmos, honest to God name.

MR. de BOER: Hey, that's my cousin.

MR. ROBINSON: He changed it legally to Amor DeCosmos. So they just didn't give a darn about the natives. As long as they didn't get in their way, nobody felt they had to sign a treaty with them. Very foolish of them. Now, they have to do it now.

MR. McILROY: We also had a B.C. Premier that was formerly known as Wacky Bennett, but I won't get into that.

I'd like to just make a comment in that the -- there was a comment made just a moment ago in one of the questions that, yes, we have treaties with natives, but are they treaties with the government of the United States. And I think David answered that.

But the idea of a treaty in my mind is something between a national government and another national government. And underpinning that is the idea it's between the executive of the national government and the executive of the national government.

And, as you know, Prime Minister Martin and President Bush are going to be meeting later on this month. And the idea is that when two executives get together, they can actually do something. I'm not so sure given what we've been hearing today and yesterday.

I mean, more and more what we're hearing is, even at the national level, you have -- in the executive branch, you have Federal Departments with very

conflicting agendas that are all fighting with each other. I believe Ambassador Giffin referred to that as stovepiping.

The other thing you have is you have the dynamic -- the executive cannot just decide, you also have the Congress, you have the legislature, which is a far more difficult dynamic in the United States, I think, than it is in Canada with our parliamentary system.

And then on top of this Federal executive and legislative fighting, we have Federalism, where you have many states and provinces involved. And you heard -- I found it fascinating, Don's divide and conquer strategy, and let's deal with Alaska, and then we'll deal with the guys in the south. But Americans seem to be doing that with Canada on soft wood lumber.

I guess the point that I'm saying is that in addition to the Federal and Provincial Government and all of the executive, legislative fighting going on within there, you now have a more recent layer, which is non-governmental organizations. I mean, it was complicated enough when you just had governments involved.

And I guess my question to the speakers is that our conference is multiple actors in Canada-U.S. relations. I think that your presentation has just told us how multiple it is. I mean, even when you talk about fishers, there's industrial fishers and boutique fishers.

Are governments becoming bit players in Canada-U.S. relations? And if their power is spread out and diluted as much as it is, they seem to be more mediators than executive decision-makers.

And I guess my real question is, is this a recipe for an action and for the status quo, because you just -- power is so spread out, you're just never going to be able to get a big bang kind of a decision. It's always going to be a very compromised mediated type of decision.

MR. COLSON: I was listening yesterday in the afternoon session about what might be the right thing to do on some of these border crossing issues. And while I have no background in that body of legal relationships, I could see the complexity involved in just trying to put a deal together both on -- just on one side of the border, but then trying to bring both sides of the border together.

And then we heard about the Columbia River Treaty. And the Columbia River Treaty was negotiated what, 40 years ago. It was clearly a treaty that had a very substantial vision and technical backing to it, but it was not a treaty that today could have been negotiated with 2,500 stakeholders.

It had to -- I don't know anything about its background, but it had to be a treaty that a only a few people on both sides of the border where involved with, said, yes, this is the right thing to do. They went out, they put it together, they got some political support, and they got it through the Senate on the U.S. side.

I don't think there's any way in God's green earth you can do a treaty like the Columbia River Treaty today in the United States. It just -- it's too big. It's too visionary. It has too many interests now involved. And it would take an enormous amount of energy to try to make that happen.

So, yes, I think in part we have, at least on our side, on the issues that I'm familiar with, it is really hard to move off the status quo. And the only way you can do it, if one of two things happens.

One, all of a sudden, the Federal Government is prepared to throw a bunch of money at people in order to get them to come to some reasonable point of view. And that happens in some of these cases. And that's the way you bring people together sometimes, you say, look, if all you guys be reasonable, and we work out this deal with Canada, the Federal Government will throw a bunch of money at the problem, and we'll take care of this in some way. And it will be this win-win thing that people were talking about yesterday.

And, then, the other way that the status quo is overcome is when there's total disaster out there. And when there isn't another fish in the ocean, then it's a lot easier to negotiate about fish than when there's something to fight about.

MR. McILROY: On that happy note, we'll pass it over to Don.

MR. McRAE: Throwing money at it was part of the Pacific Salmon solution. The U.S. Government established an endowment fund. And that made the Alaskans happy. The U.S. Government also gave money for the buyout for the State of Washington. So money was a critical part of it.

But I also think that the reality is changing. The idea that the Prime Minister and cabinet will run roughshod and enter into treaties at will no longer applies, if it ever did. Domestic interests have to be reconciled. Similarly, two governments can't sit down and say we know the national interests and we can negotiate agreements without the involvement of stakeholders is also gone.

And what it comes down to also is what we mean by national interests. In negotiating the Pacific Salmon agreements, the governments were really the agents for the various people on both side of the border who are interested in the salmon, who derive a livelihood from it, or who benefit from the economic and the environmental or cultural value of the salmon.

Now, you can call that the national interest, or you can call it local sectional interests, but those are the interests that have to be reconciled. And it only makes sense that those interests have to be taken into account. What we need to find are negotiating mechanisms and techniques that will involve those interests much more.

This is happening in other areas, too. If you look at the negotiation of the Land Mines Convention or the International Criminal Court, governments sat

down with NGO's. Those NGO's were involved in the negotiations because reflecting the interests that the governments were promoting.

So international negotiations are becoming messier, but it is getting messy everywhere, not just in this area.

Now, you can call that the national interest, or you can call it local sectional interests, but those are the interests that have to be reconciled. And it only makes sense that those interests have to be taken into account. What we're finding is systems that are involving those interests much, much more.

This is not the only area. If you look at the negotiation of the Land Mines Convention, the International Criminal Court, governments sat down with NGO's. NGO's were involved in those negotiations because those are the people who were pushing the interests that the governments were reflecting.

So I think it's messy, and it's getting messy everywhere, not just in this area.

MR. McILROY: I'm going to wrap it up, but I guess from my perspective, I see what we've been discussing over the last few days is a recipe for very incremental changes, not big bang visionary changes in the relationship.

But I'd like to thank our speakers. As I said, there is more to this than meets the eye. I think they've really given us a case study of how -- particularly, David's historical perspective, as how they did deals in the past, and now how they do deals now. And just seeing how all of these new interests have become involved in this process and made it, as Don said, a rather messy process. But democracy is messy.

Thank you very much.

(Session Concluded)



